TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 1769.

GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 5, 1908.

(21,005.)

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SUPREME COURT OF THE UNITED STATES.

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GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT,

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1908.

1 In the Court of Claims of the United States.

28947.

GUILLERMO ALVAREZ Y SANCHEZ
against
THE UNITED STATES.

I.—*Petition. Filed April 9, 1906.*

To the Honorable, the Court of Claims of the United States:

The claim of Guillermo Alvarez y Sanchez respectfully represents:

FIRST. That claimant is a native inhabitant and a citizen of the Island of Porto Rico and that at all times hereinafter mentioned, and for a long time prior thereto, claimant was, and he now is a native inhabitant of said Island and a resident of the City or Town of Guayamo in said Island.

SECOND. That on or about the 8th day of April, in the year One thousand eight hundred and seventy-eight, said claimant purchased from one Florencio Berrios y Lopez, for a valuable consideration a certain office known as "Numbered Procurador of the Courts of first instance of the capital of Porto Rico," at Guayamo, in perpetuity, and that the provisional patent to said office was issued in favor of said claimant by the Governor General of said Island of Porto Rico on or about the 18th day of March, in the year One thousand eight hundred and eighty. That thereafter on or about the 31st
2 day of October, in the year One thousand eight hundred and eighty-one, the tenure of said office by said claimant was approved and confirmed and a final patent issued therefor by His Majesty, Alfonso XII, King of Spain, through the Minister of the Colonies of said Kingdom of Spain, in accordance with the laws, practice and custom of the said Kingdom of Spain and the said Island of Porto Rico governing the sales, surrenders and transfers of said office of Procurador of the capital of Porto Rico. That claimant thereupon became vested with all the rights and privileges appurtenant to said office under said laws.

THIRD. That said claimant exercised and continued to exercise all of the rights and privileges appurtenant to said office of Procurador or Solicitor from the time that the said provisional patent was issued to him until he was deprived of said office on or about the 31st day of August, in the year one thousand eight hundred and ninety-nine, as hereinafter set forth.

FOURTH. That at the time of the purchase of said office by this claimant and for a long time prior thereto, the laws, of which the following are correct translations, in so far as the same relate to said office of Procurador or Solicitor, were in full force and effect in said Kingdom of Spain and said Island of Porto Rico, except as modified by subsequent laws whose translations are also given below. That

said laws continued to be the laws of Spain in force in Porto Rico and were in full force and effect on August 31st, 1899, when said office of Procurador or Solicitor belonging to this claimant was abolished as hereinafter set forth.

3 "LAWS OF THE INDIAS.

"TITLE XX.

"*Sale of Offices.*

"*First Law.* From 1522 to 1645. That in the Indias the offices specified in this Law be sold.

"Whereas one of the principal and best known prerogatives of Our Royal Preëminence and Lordship is the creation and provision of public offices, (which are) so necessary to the proper administration of justice that the Republic cannot live without them, and (which are) so important to the good government of our States and to the expediting of the many and various matters which there arise; which said offices are of two kinds (Namely); those involving jurisdiction and those which have a participation in said jurisdiction though not enjoying them as of right; (and whereas) the general and public necessity requires reserving the offices of the first class, and that those of the second class be disposed of ('se beneficien') for the benefit of our Royal Treasury; and

"Whereas in the time of the Catholic Kings, our predecessors, certain offices were created which were given and conferred gratuitously to benefactors of our Royal Crown, and which they (said Kings) later decided to sell and dispose of as benefices whenever vacancies occurred, with the right to transfer the same:

"(Now therefore), our will is and we do order that the following offices be salable and transferable as has heretofore been observed according to our Resolutions generally and specifically given
4 (namely) * * * Solicitors of the 'Audiencias' of the Ordinary Courts. * * *

"All of which said offices and all others which by our Resolutions and authority have been or may be created, sold and benefited in all our Indias and adjacent Islands. It Is Our Will and We Do Order shall continue and be controlled by the rules and laws which govern salable and transferable offices, the terms and conditions under which said sales, transfers and confirmations shall be effected and all else (relative thereto); and for whatever grants we have been pleased to make or may make by sale and in perpetuity the titles (patents) and orders (relating thereto) shall be kept (given full faith and observed)."

CODE OF CIVIL AND CRIMINAL PROCEDURE OF PORTO RICO, JANUARY 30th, 1855.

"CHAPTER VII.

"SECTION FIRST. *Regarding Transferable Offices.*

"Article 123. All salable and transferable offices in the Department of Justice, which shall hereafter become vacant, according to existing laws shall be sold at public sale for only one life.

"Article 124. Life offices acquired by purchase are transferable under any form of assignment permitted by law, but the new assignees shall not enjoy the same except during the life of the assignor (original purchaser at public sale); upon each transfer the transferee shall pay (to the Royal Treasury) one half of the price of the last public sale, and shall, within one year, subject to forfeiture in case of default, solicit the Royal Confirmation.

"Article 125. An assignee of one of the life offices sold at public sale, when he has acquired the same by virtue of an assignment from the owner, may, if he desires to hold the same during his own life, obtain this right by paying (to the Royal Treasury) a sum equal to that realized at the last public sale.

"Article 126. All sums collected by the Treasury from life offices sold shall be used for the express purpose of reacquiring those granted by the Crown in perpetuity.

"Article 127. For the reacquisition of said offices, the proceeding shall be according to law paying back to the owner the sums paid by him for account of the issue and for contributions, as also any further sums which may have been paid into the Treasury in connection with the acquisition, preservation and transfer of said offices.

"Article 128. Whenever any funds sufficient for said purchase shall have been collected, the office to be acquired shall be determined by lot, for which purpose the Intendant shall determine and preside over the drawing.

"Article 129. If the office so drawn should be appraised at a sum in excess of that available for the purpose the difference shall be advanced by the Treasury upon condition that said advance shall be repaid out of the first moneys collected from the offices referred to.

"Article 130. A special order shall prescribe the formalities which must precede the public sales, those to be observed at the drawings and those which shall govern thereafter until the owners be fully indemnified."

"CHAPTER VII.

"SECTION THIRD. *Regarding Solicitors.*

"Article 139. In the Courts and tribunals of the colonies where Solicitors are established, litigants shall not be represented in any suit except by a person of the official character referred to; except only in cases where by law they are permitted to appear in their own defense personally or by some person especially designated.

"Article 140. For every transferable Solicitorship which shall expire or revert to the Crown according to the provisions of Article 128, a new Solicitorship of the same class shall be created.

"Article 141. Whenever in any Court or Audiencia all transferable Solicitorships to-day existing shall have been extinguished, the numbers of Solicitorships in said Audencia or Court shall no longer be limited."

LAW OF CIVIL PROCEDURE AS REFORMED FOR THE ISLANDS OF CUBA AND PORTO RICO, SEPTEMBER 25th, 1885.

"Book First.

"Title First.

"Section First.

"Article 3. Appearance in an action shall be by a Solicitor lawfully qualified to act before the Court or Tribunal having cognizance of the matter, which Solicitor shall also hold a power of
7 attorney approved by a lawyer as sufficient.

"Article 5. * * * Once the Solicitor has accepted the power of attorney, his obligations are as follows:

"1. To follow the action so long as he shall not cease to act as Solicitor for any of the causes mentioned in Article 9.

"2. To transmit to the lawyer selected by his client or by himself, when he shall be authorized to make such selection, all the documents, information and instructions which may be sent to him or which he may be able to obtain, and to do whatever may conduce to the defense of his principal subject to the responsibilities imposed by law upon agents, and, in default of instructions or whenever the instructions given by the client shall be insufficient, he shall do whatever the nature or character of the matter may require.

"3. To take from the possession of the lawyer who ceases to be engaged in the matter copies of such proceedings, documents and other data as may be in his hands in order to deliver the same to such lawyer's successor.

"4. To keep his client and the lawyer always informed as to the condition of the matter entrusted to his care, sending to the latter copies of all proceedings of which he may be notified.

"5. To pay all expenses incurred at his instance, including counsel fees, even when such counsel shall have been selected by his principal.

"6. So long as such Solicitor shall continue to act, he shall hear and sign extensions, citations, requisitions and notifications
8 of all kinds, including judgments, which during the pendency of the suit and until the judgment shall be executed, ought to be communicated to his client; this with the same effect as though made directly to the principal, and it shall not be lawful for said Solicitor to ask that service be made directly upon his client."

THE CIVIL CODE IN FORCE IN PORTO RICO JULY 31st, 1889.

"Book Second.

"Title I.

"Chapter Second.

"Article 336. As personal property are also considered rents or pensions, either for life or hereditary, in favor of a person or family; also purchased public offices, contracts for public service, etc."

"Title II.

"Chapter First.

"Article 349. No one shall be deprived of his property, unless it be by competent authority, and with justified cause for public utility, and never until he has previously been properly indemnified.

"If this requirement has not been complied with the judges shall protect, and, in proper cases, replace the condemned party in possession."

9 Fifth. That the office acquired as aforesaid by claimant was a transferable or numbered Solicitorship, in perpetuity, vested with exclusive rights and privileges, as set forth in said laws; that as a consequence thereof claimant was entitled under the laws of Spain in force in Porto Rico, during all the times during which he held said office of Procurador or solicitor, to perform and discharge the duties of said office and to receive the fees and emoluments thereof; that the fees and emoluments thus received for a period of many years immediately prior to August 31st, 1899, averaged upwards of $200 per month.

Sixth. That at the time of the purchase by said claimant of the office of Procurador or Solicitor as hereinbefore set forth, and for more than fifty years prior thereto; also at all times subsequent to said purchase until the issuing of General Order No. 134 of August 31, 1899, hereinafter mentioned, the number of Procuradors or Solicitors in said Island of Porto Rico whose owners enjoyed the exclusive rights above referred to, was limited both by the laws of Spain in force in said Island, and by custom, well known to and recognized by said government and well known to and recognized by the inhabitants of said Island; that at all of said times the number of such Solicitorships in the City or town of Guayamo in said Island was by said laws and custom limited to two, the office of said claimant being one of said two Solicitorships. That during said period, the number of Procuradors or Solicitors of any kind in said Island of Porto Rico and City or Town of Guayamo was not permitted either by law or custom to exceed and did not in fact exceed the number limited as above stated.

Seventh. That by reason of the law and customs hereinbefore referred to, this claimant upon acquiring said title to said office of

"Numbered Procurador of the Courts of first instance of the
10 capital of Porto Rico," became vested under the laws of said Kingdom of Spain, and of the said Island of Porto Rico, with an irrevocable, exclusive, valuable property right which could be sold and transferred by him, and which could not be taken from him, except by due process of law.

EIGHTH. That on the 10th day of December, 1898, a treaty of peace between the United States of America and the Kingdom of Spain was concluded and signed by their respective plenipotentiaries at Paris, in the French Republic. Said treaty was ratified by the Senate and by the President of the United States on the 6th day of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the City of Washington, in the District of Columbia, on the 11th day of April, 1899, and on the same day the same treaty was proclaimed by the President of the United States. That under Article II of said treaty, the said Island of Porto Rico was ceded to the United States, and under Article VIII Paragraph 2 of said treaty, the property and rights of the individuals in said Island were provided for as follows:

* * * * * * *

"And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded or if private individuals, of whatsoever nationality such individuals may be."

* * * * * * *

11 NINTH. That a Military Government was maintained by the United States in the Island of Porto Rico from in or about the month of October, 1898, to April 30th, 1900. That George B. Davis, Brigadier General of the United States Army, was in command of said Island as such military Governor from May 8th, 1899, to April 30th, 1900.

TENTH. That during the maintenance of said Military Government in said Island of Porto Rico, said Davis, in violation of the provisions of the said Treaty of Paris, of the Constitution and Laws of the United States and the laws then in force in Porto Rico, and of the rights of this claimant, on or about the 31st day of August, 1899, issued a certain order known as General Order No. 134. Paragraphs 11, 12 and 13 of said order, of which the following is a translation, provide as follows:

"XI. The office of Solicitor ("procurador") is *abolished*. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of Municipal Courts.

"XII. Hereafter, litigants who do not appear personally shall be

represented before the Supreme Court and District Courts *exclusively by a lawyer*, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur.

"In the municipal courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place.

12 "XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court."

ELEVENTH. That said order was issued by said Davis without any notice whatever to this claimant, and without affording him any opportunity to be heard, and without any complaint as to the manner in which said claimant was exercising his rights and duties. The said order thereafter remained in full force and effect, as a Military measure thereby suspending meanwhile the plaintiff's right to the use and enjoyment of his said property until said military order was ratified by Congress as set forth in the following paragraph.

TWELFTH. That on or about the 12th day of April, 1900, a certain act entitled "An Act Temporarily to provide Revenues and a Civil Government for Porto Rico, and for other purposes" was enacted by Congress, Section 8 of which Act provided in part as follows:

"SECTION 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered, or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by Act of Congress of the United States."

That by the aforesaid Act of Congress, said property of the plaintiff was finally and effectually confiscated by the Government of the United States.

13 THIRTEENTH. That the reasonable value of the office of "transferable" or "Numbered Procurador of the Courts of first instance of the capital of Porto Rico," in perpetuity, of which claimant was deprived as aforesaid, is Fifty thousand ($50,000) dollars.

FOURTEENTH. That no compensation has ever been made to this claimant for the loss of his said office, and no action has been had on this claim in Congress, or by any of the Departments of the United States Government. That claimant is the sole owner of this claim, and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof, or interest therein, has been made. That claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets.

FIFTEENTH. That claimant is a resident and a citizen of the

Island of Porto Rico, and has borne true allegiance to the United States since the annexation to the United States of said Island, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States; and the claimant believes the facts as stated in said petition to be true. And the claimant claims Fifty thousand ($50,000) dollars.

GEO. X. McLANAHAN,
Attorney for Claimant.

14 UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

Geo. X. McLanahan, being duly sworn, deposes and says that he is the attorney for the claimant in this case; that he has read the above petition and that the matters therein stated are true to the best of his knowledge and belief; that the reason why this verification is not made by the claimant is that the claimant is without the United States, to wit; in the Island of Porto Rico.

GEO. X. McLANAHAN.

Subscribed and sworn to before me this ninth day of April, A. D. One thousand nine hundred and six.

[NOTARIAL SEAL.] H. RALPH BURTON,
Notary Public, D. C.

15 II.—*Demurrer. Filed June 2, 1906.*

In the Court of Claims of the United States.

No. 28947.

GUILLERMO ALVAREZ Y SANCHEZ
vs.
THE UNITED STATES.

And now come the said defendants, by their Attorney General, and demurring to the petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

J. A. VAN ORSDEL,
Assistant Attorney General.

16 III.—*Argument and Submission on Demurrer.*

On January 7, 1907, on the demurrer to claimant's petition, Mr. Assistant Attorney General J. A. Van Orsdel and Mr. F. W. Collins were heard in support of the demurrer and Mr. Henry A. Stickney in opposition, and it was submitted.

17 IV.—*Opinion of the Court Sustaining the Demurrer and Ordering the Petition to be Dismissed.*

GUILLERMO ALVAREZ Y SANCHEZ
v.
THE UNITED STATES.

PEELLE, *Ch. J.*, delivered the opinion of the court:

To the petition filed herein the defendants interpose a demurrer, assigning as ground therefor "that the petition does not allege facts sufficient to constitute a cause of action."

The facts averred and which are material to the case are that the claimant, a native citizen of the island of Porto Rico, did, on the 8th day of April, 1878, purchase from one Florencio Berrios y Lopez for a valuable consideration a certain purchasable office known as "numbered procurador of the courts of first instance of the capital of Porto Rico," at Guayamo, in perpetuity, and that the provisional patent issued therefor by the governor-general of said island was, on or about October 31, 1881, approved by the King of Spain through the minister of the colonies of the Kingdom of Spain in accordance with the laws, practice, and custom of the Kingdom of Spain, by virtue of which it is averred that the claimant "became vested with all the rights and privileges appurtenant to said office under said laws," which said office was then and there reasonably worth $200 per month; and that being thus clothed the claimant exercised all the rights and privileges pertaining to said office of procurador or solicitor from the time said office was confirmed in him until August 31, 1899, when said office was abolished, as hereinafter set forth.

That the United States took possession of said island during their war with Spain and maintained a military government therein from about October, 1898, to April 30, 1900. That while in the possession and military control of said island, to wit, December 10, 1898, the treaty of peace between the United States and the Kingdom of Spain was concluded, and having been signed by the respective plenipotentiaries at Paris was subsequently ratified by the respective governments, which ratifications were on April 11, 1899, exchanged at the city of Washington and on the same day proclaimed by the President.

That by virtue of article 2 of said treaty the island of Porto Rico was ceded to the United States; and by article 8 it was "declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associa-
18 tions having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals of whatsoever nationality such individuals may be," etc.

That the office so purchased and held by the claimant was on said 31st day of August, 1899, abolished by General Order No. 134, issued

by General Davis, in command of said island as military governor thereof, paragraphs 11, 12, and 13 of which are as follows:

"XI. The office of solicitor ("procurador") is *abolished*. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of municipal courts.

"XII. Hereafter litigants who do not appear personally shall be represented before the Supreme Court and district courts *exclusively by a lawyer*, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur.

"In the municipal courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place.

"XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court."

That said order was issued without any notice whatever to the claimant and without complaint as to the manner in which the claimant was exercising the duties of said office.

That thereafter by section 8 of the act of April 12, 1900 (31 Stat. L., 77, 79), being an act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," Congress ratified among others said order in these words:

"SECTION 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States * * * ."

That the claimant by virtue of the laws of Spain had a vested property right in and to said office at the time the general order was issued, and that by reason of said order the claimant was deprived of his right to discharge the duties of said office and to receive the emoluments thereof to his loss and damage in the sum of $50,000.

The substance of the facts averred is that the claimant held by purchase in conformity with the laws, usage, and customs of the Kingdom of Spain in force in the island of Porto Rico the office of procurador or solicitor in perpetuity, the salary of which was about $200 per month, and that by virtue thereof he had a vested property right in and to said office when the same was abolished as aforesaid, and that the abolition of said office operated as a taking of private property for public purposes, for which no compensation has been made.

The defendants, without plea thereto, raise the question of jurisdiction, claiming, in substance, first, that the act of the com-

19 manding general as military governor in abolishing the office so held by the claimant was wrongful and unlawful and,

therefore, tortious, and being tortious this court is without jurisdiction. We can not agree with the defendants that the act abolishing said office was unlawful or wrongful, though so averred in paragraph 10 of the petition. The order issued abolishing the office was in conformity with the laws and usages governing the change or modification of the laws of newly acquired territory by conquest or cession; and being within the possession and rightful powers of the United States as the conqueror, the act abolishing the office was not tortious, and for that reason the defendant's contention can not be sustained.

Second, the defendants further contend that whatever claim exists in favor of the claimant grows out of and is dependent upon the treaty between the United States and the Kingdom of Spain, by which said island was ceded to the United States, and that therefore under Revised Statutes, section 1066, this court is prohibited from taking jurisdiction. But even if said section has not been repealed by the Tucker Act, we think the contention is untenable because the claim as averred, if it exists, arises out of the act of the general in command of said island as military governor in abolishing the office, and not out of the treaty.

If, when the office was abolished, the claimant had any property right therein, then such right was preserved to him by article 8 of the treaty; but in the view we take the claimant had no property right in the office at the time of the issuance of said order; and having no property right therein, there is no claim growing out of or dependent upon the treaty; hence the defendant's contention can not be sustained.

This brings us to the main question in the case, *i. e.*, Did the claimant at the time of the issuance of the order abolishing the office have any property right in the office which he held; and, if so, did said order operate to deprive him thereof for the public use?

During the war with Spain, the United States, in the exercise of their belligerent right, took possession by military force of the island of Porto Rico, then under the dominion and sovereignty of Spain, and, as averred in paragraph 9 of the petition, maintained a military government in said island from about October, 1898, to April 30, 1900.

When the United States thus took and maintained possession of said island, the sovereignty of Spain was thereby appropriated by them, and the inhabitants of said island became subject to the will of the United States, though their private rights and their relations to each other remained the same. (*The Fama*, 5 C. Rob., 126; *United States v. Percheman*, 7 Peters, 86; *United States v. Hayward*, 5 Gallison, 52.)

And as the military occupation of said island was firm, the United States, by virtue thereof, acquired all the rights of the displaced sovereignty, including the right to acquire complete title at least to all movable property of a public character belonging to Spain, and as well the public offices therein having to do with the administration and execution of the laws in said island. (*United States v. Rice*, 4 Wheat., 246-254; *Fleming v. Page*, 9 How., 603-615.)

When the treaty of Paris of December 10, 1898 (30 Stat. L., 1754),

was negotiated, the principle of *uti possidetis* was recognized, *i. e.*, the right to retain possession of the territory acquired by force during the war, and as there is no stipulation in the treaty to the contrary, the island was left in the state in which it was found. Hence the title of the conqueror in the public movable property as well as to the public offices created by the sovereignty of Spain could not thereafter be questioned. (*Wheaton's International Law*, sec. 545.)

However, whether the island be considered as acquired by conquest or by cession on the basis of possession of the territory by force, the inhabitants in either case became subject to the sovereignty of the United States, the difference in substance being that in case of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sovereignty is appropriated, while if acquired by expressed cession the sovereignty is transferred by the act of the state making the cession. (*Hall's International Law*, sec. 206.) The former, however, was the course which Spain was forced to pursue; that is, by virtue of the military possession of the island, Spain was forced, as a condition of peace, to cede to the United States the island so acquired and held, not that the cession was necessary to give to the United States the sovereign control of the island, but it operated to confirm in them all the rights which they had theretofore acquired by conquest.

The release of the island from the sovereignty of Spain, whether effected by coercion or by conquest, imposed no obligation upon the United States to indemnify those who may have suffered loss of property by such cession. (1 *Kent's Commentaries*, p. 178.) If, therefore, the claimant's loss of property in the office he held by purchase was due to the cession so made, rather than by conquest, no liability attached to the United States to make compensation therefor.

Conceding that prior to the conquest the claimant had, as between himself and Spain, a property right in the office, such right under the laws of Spain existed only by virtue of said office being a salable one in perpetuity, which office and tenure rested wholly in the sovereignty of Spain, so that when the sovereignty of Spain was displaced and superseded by the sovereignty of the United States and confirmed by the treaty without any words therein making the office perpetual in the claimant under the sovereignty of the United States, all right of property in and to said office was lost by the withdrawal of the sovereignty of Spain.

After the conquest of the island and the confirmation thereof by the treaty as aforesaid, the claimant, if he continued to hold said office, did so at the sufferance and will of the United States, and no right of property in said office can be predicated on such continuance in office.

The office so held by the claimant, as well as all other offices having to do with the execution and administration of the laws in force in said island, were subject to the will and control of the United States exercised through the President as commander in chief of the Army and Navy of the United States, or the Congress; and being so subject, and there being no restrictive words in the treaty, the claimant

could have been removed from office or the office abolished, as was done at the will of the President acting through the military governor, without imposing upon the United States any obligation to compensate the incumbent of said office for any loss he may have sustained thereby. True, under the rules of international law, the laws, uses, and municipal regulations in force in the island at the time of the conquest or cession remained in force until changed by the new sovereign. (*Mitchell v. The United States*, 9 Peters, 21 711-735.) But such change is an inherent right to be exercised at the will of the conqueror without condition or restriction unless imposed by the terms of the treaty.

As no right of property in the office held by the claimant was reserved to him by the treaty, none survived it, and, therefore, when the office was abolished, the claimant had no property right therein which was the subject of a taking for public use.

The provisions of article 8 of the treaty, upon which the claimant relies for the preservation of his right of property, are merely declaratory of the rights which belong to the inhabitants of a territory acquired by conquest or treaty. That is to say their rights of property not taken from them by order of the conqueror remain undisturbed. In other words, as before stated, the cession or conquest of territory does not affect the rights of private property. (*The Fama*, 5 C. Rob., *supra*.)

But in the present case, as the claimant's right of property was annexed to the public office which he held by purchase in perpetuity and existed wholly in the sovereignty of Spain, such right was exceptional, and in the absence of any words making the office perpetual in the claimant under the sovereignty of the United States, was taken away by the act of Spain when she withdrew her sovereignty. In other words, the claimant's exceptional right of property in the office which he held was not preserved to him by the terms of the treaty; and not being within the ordinary rules protecting the private property of the inhabitants of territory acquired by conquest or cession, he stands on no better than other public officers in said territory.

We have thus considered the case upon the theory of the claimant having, as between himself and Spain, a property right in the office which he held, though under the laws of the United States such office is a public trust in which the incumbent can have no property interest. (*United States v. Hartwell*, 6 Wall., 385-393.)

Nor is a public office with us the subject of sale, a purchase, or barter. (*Taylor v. Beckman*, 178 U. S., 548-577.)

Nor can such office be termed a hereditament, or a thing capable of being inherited. (*3d Kent's Commentaries*, 454.)

The right to exercise an office in the United States is not based upon contract or grant, but is conferred as a trust to be exercised for the public benefit. (*United States v. Hartwell*, *supra*.) True, some of our States proceed upon the theory of the incumbent having a property right in the office of which he can not be deprived without the judgment of a court, but such view has no foundation in a representative government. (*Anderson's Law Dictionary*, 727;

State ex rel Atty Gen. v. Hawki , 44 Ohio St., 199; *Donahue v. County of Will*, 100 Ill., 94.)

But we need not pursue the question any further as there is no language in the treaty perpetuating the office in the claimant, and therefore it must be held that in respect to his right to the office in question he stands upon the same ground as other public officers in the island at the time of the cession of the territory.

For the reasons stated the demurrer must be sustained and the petition dismissed, which is accordingly ordered.

Howry, J., was not present when this case was tried and took no part in the decision.

BY THE COURT.

Filed October 28, 1907.

22 V.—*Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 28th day of October, 1907, judgment was ordered to be entered as follows:

The demurrer of the defendants to the petition of the claimant Guillermo Alvarez y Sanchez is sustained and the said petition is dismissed.

BY THE COURT.

23 VI.—*Claimant's Motion for a New Trial. Filed November 27, 1907, and Order of Court Thereon.*

Claimant's Motion for a New Trial.

Now comes the claimant by his attorney and moves the Honorable Court of Claims for a new trial in the above entitled cause wherein judgment was rendered sustaining the defendant's demurrer and dismissing the claimant's petition October 28, 1907, for the reason that the Honorable Court, in rendering judgment as aforesaid, made errors of law, to-wit: in holding

(1) That the claimant had no property right in the office in question at the time of the issuance of General Order No. 134 on August 31, 1899;

(2) That if the claimant's loss of property in the office held by purchase was due to the cession made by Spain rather than to conquest, no liability attaches to the United States to make compensation therefor;

(3) That if, prior to the conquest, the claimant had, as between himself and Spain, a property right in the office, such right, under the laws of Spain, existed only by virtue of said office being a salable one in perpetuity; that said office and tenure rested wholly in the sovereignty of Spain, and that consequently when the sovereignty of Spain was displaced and superseded by the sovereignty of the United States, and confirmed by the treaty without any words therein making the office perpetual in the claimant under the sovereignty

of the United States, all right of property in and to said office was lost by the withdrawal of the sovereignty of Spain;

(4) That, after conquest of the Island and the confirmation thereof by treaty, the claimant, if he continued to hold said office, did so at the sufferance and will of the United States; and that no right of property in said office can be predicated upon such continu-
24 ance in office;

(5) That the office in question was subject to the will and control of the United States exercised through the President as Commander of the Army and Navy of the United States, or the Congress; and that, being so subject, and there being no restrictive words in the treaty, the claimant could have been removed from office, or the office itself abolished, without imposing upon the United States any obligation to compensate the claimant as incumbent thereof for any loss he may have sustained thereby;

(6) That no right of property in the office held by the claimant was reserved to him by the treaty; that no such right survived the treaty; and that, therefore, when the office was abolished, the claimant had no property right therein which was the subject of a taking for public use;

(7) That, as the claimant's right of property was annexed to the public office which he held by purchase in perpetuity and existed wholly in the sovereignty of Spain, such right was exceptional, and, in the absence of any words making the office perpetual in the claimant under the sovereignty of the United States, was taken away by the act of Spain when she withdrew her sovereignty;

(8) That, if the claimant had a right of property in the office which he held, it was exceptional and was not preserved to him by the terms of the treaty; and that, such right not being within the ordinary rules protecting the private property of the inhabitants of territory acquired by conquest or cession, the claimant stands on no better terms than other public officers of said territory.

In support of this motion, the Court is respectfully referred to the various authorities mentioned in the briefs heretofore filed in this case on behalf of claimant.

GEORGE X. McLANAHAN,
Attorney for Claimant.

January 23, 1908:

Ordered that the motion of claimant be overruled.

BY THE COURT.

25 VIII.—*Application of Claimant for Appeal. Filed December 28, 1907, and Allowance of Same.*

No. 28947.

GUILLERMO ALVAREZ Y SANCHEZ
v.
THE UNITED STATES.

Application for an Appeal.

From the judgment rendered in the above-entitled cause on the 28th day of October, 1907, in favor of the defendant, the claimant by his attorney, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

GEORGE X. McLANAHAN,
Attorney for Claimant.

Filed December 28, 1907.

January 23, 1908:
Ordered that this appeal be allowed as prayed for.
BY THE COURT.

26 VIII.—*Certificate.*

Court of Claims.

No. 28947.

GUILLERMO ALVAREZ Y SANCHEZ
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court sustaining the demurrer of the defendants; of the judgment of the Court dismissing the petition; of the motion of claimant for new trial and order overruling same; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 5th day of February, 1908.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,005. Court of Claims. Term No. 267. Guillermo Alvarez y Sanchez, appellant, *vs.* The United States. Filed February 5th, 1908. File No. 21,005.

12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 69.

GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT,

against

THE UNITED STATES, RESPONDENT.

APPELLANT'S BRIEF.

S. MALLET-PREVOST,
Attorney for Appellant, 30 Broad Street, New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 69.

GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT,

against

THE UNITED STATES, RESPONDENT.

APPELLANT'S BRIEF.

Statement of the Case.

This is an appeal from the judgment of the Court of Claims entered October 28, 1907. The claimant filed his petition in that court on April 9, 1906. On June 2, 1906, the defendant demurred thereto upon the ground that the said petition did not allege facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the claimant's petition. The claimant's motion for a new trial was overruled on January 23, 1908. An appeal to this court was allowed on the same date.

Statement of Facts.

The appellant herein, a native citizen of Porto Rico, purchased from one Lopez on the 8th day of April, 1878, for a valuable consideration a perpetual office known as "num-

bered procurador of the Courts of First Instance of the Capital of Porto Rico" at Guayamo (Record, p. 1). The patent for this office was subsequently duly issued to the claimant by the King of Spain (Record, p. 1).

According to the Spanish law in force in Porto Rico at the time of the purchase, appearances in actions were required to be by a "procurador" or solicitor (Record, pp. 3, 4); the duties of the latter consisted chiefly in following the course of the litigation in which they were employed and keeping their clients' attorneys advised and informed of any steps taken in such litigation (Record, p. 4). Solicitors were entitled by law to receive a reasonable compensation for their services (Record, p. 5, fol. 9). The claimant's office constituted property under the Spanish law.

The appellant exercised all the rights and privileges pertaining to the office until August 31, 1899 (Record, p. 1, fol. 2), when the same was abolished by General Order No. 134, issued by General Davis, Military Governor in command of the Island (Record, p. 6, fol. 11). This order was made more than four months after the Treaty of Paris, and was ratified by the act of Congress of April 12, 1900, known as the Foraker Act (Record, p. 7, fol. 12).

Specification of Errors.

The appellant contends that the court below erred:

1. In deciding that the claimant's petition did not allege facts sufficient to constitute a cause of action and sustaining the demurrer thereto.

2. In dismissing said petition.

Brief of the Argument.

The argument of the appellant may be summarized as follows:

1st. The case of O'Reilly de Camara *vs.* Brooke, decided by this court March 16, 1908, is not decisive of this case.

2d. The claimant's petition alleged a good cause of action, since:

1. The claimant's office was property under the Spanish law.

2. It was not impaired during the military occupation of Porto Rico.

3. The Treaty of Paris confirmed the claimant's property.

4. The United States deprived the claimant of his property after the Treaty of Paris and became liable to compensate him for the value thereof.

POINTS.

I.

The case of O'Reilly de Camara is not decisive of this case.

Subsequent to the appeal from the judgment of the Court of Claims herein the Supreme Court handed down its decision in the case of O'Reilly de Camara *vs.* Brooke, 209 U. S., 45. We feel, however, that the facts in the present case clearly distinguish it from the O'Reilly case. We desire to briefly indicate the difference between the two.

In the O'Reilly case the plaintiff was the owner of the heritable office in Cuba known as Alguacil Mayor of Havana, to which was attached the right to receive compensation for the slaughter of cattle. The office was abolished by the following order:

> "Office of the Governor-General of the Island of Cuba.
>
> "His Excellency, the Governor-General, endorsing and approving the opinion of the Council of Administration, has been pleased to order:
>
> "1st. That all the Regidores Perpetuos (perpetual councillors) now forming part of the municipal councils of this Island, shall cease in the fulfillment of the duties pertaining to them. Their offices shall no longer be counted among the offices of the Municipal Council. All members of the latter shall hereafter be elected in the manner and form provided by the Electoral Law.
>
> "2d. That the provisions of the law of July 27, 1859, in its additional and temporary chapter or title, directing that the said 'Regidores Perpetuos' should not be deprived of any emoluments to which they are entitled, until the proper indemnification therefor be paid to them, shall remain in force.
>
> "And by order of His Excellency this is published in the official Gaceta for general information.
>
> "R. Galbis,
> "Secretary.
>
> "Havana, November 2, 1878."

The law of July 27, 1859, referred to in the preceding order, so far as pertinent to an understanding of that order, provided as follows:

> "Article 99. The office of Alguacil Mayor of Havana, by reason of its large returns, will be the subject of a special investigation, etc., etc.
>
> "Article 100. In any of the cases covered by the two preceding articles, the holders of the offices referred to shall continue in the exercise of such offices

> and in the receipt of its emoluments until payment of the sums that may be respectively fixed upon."

It is clear, therefore, that the plaintiff's ownership of or property in the office and its appurtenance had wholly ceased before the military occupation. The only thing that remained was a claim against Spain for the value of the property of which the plaintiff had been deprived. It was a mere obligation of Spain to the plaintiff. Of course this debt was not assumed by the United States upon the temporary occupation of Cuba, any more than any other debt of Spain in that Island. The plaintiff in the O'Reilly case was obliged to contend that the United States assumed the obligation of Spain to the plaintiff, i. e., the duty of compensating him for the property right of which Spain had deprived him in 1878. We understand that this court held in the O'Reilly case that in Cuba neither the plaintiff's right to the office nor to compensation for its loss existed against the United States or against Major-General Brooke.

The present case differs from the O'Reilly de Camara case in several material points. In the present case the appellant was not possessed of a mere claim against Spain for the deprivation of his property, but was in the undisturbed enjoyment and possession of the same, at the time of the military occupation; he was actually engaged in the performance of the duties of his office. Moreover, this suit is not against an individual officer of a government, but against the government itself, which divested him of the property which the Treaty of Paris expressly confirmed in him. Furthermore, this suit involves the Island of Porto Rico and not that of Cuba; and it is well recognized that a different state of affairs existed in the two islands. The O'Reilly de Camera case is, therefore, not conclusive upon the one at bar.

II.

The complainant's petition states a good cause of action.

1. The claimant's right constituted property under the Spanish law. (See Civil Code of Porto Rico of 1889, Art. 336, 349, Rec., p. 5).

Moreover, the provisions of the Code of 1855 clearly indicate that Spain recognized that the holders of the offices held *in perpetuity* could not be deprived thereof without compensation. (See Arts. 126-9, 140-1, Civil Code, Porto Rico, 1855, Rec., pp. 3, 4:) It is important in this connection to note that the claimant's solicitorship was a *perpetual* and not a *life* solicitorship. The latter were of a wholly different character.

2. Prior to April 11, 1899, the date of the exchange of ratifications of the Treaty of Paris, and of the commencement of the sovereignty of the United States in Porto Rico, neither the office nor the property therein had been destroyed or abrogated.

The Court of Claims held that the property in the office ceased when the sovereignty of Spain ceased, but did not state when that latter ceased. It bases the title of the United States to Porto Rico on acquisition by conquest. This is the necessary inference from those portions of its opinion which appear in the record at pages 11 and 12 which expressly speak of the conquest of the Island and of the confirmation by the treaty of the rights theretofore acquired by conquest.

This attempt to make the termination of Spanish sovereignty cotemporaneous with conquest cannot be supported

In the first place the United States did not acquire Porto Rico by conquest, but by cession. When the Protocol of Agreement was signed August 12, 1898, the United States was actually engaged in hostility in the field with Spanish

troops in Porto Rico. The protocol provides in part (see Senate Document No. 62, part 2; being a message from the President of the United States to the Senate) as follows:

> "ARTICLE II. Spain *will cede* to the United States the island of Porto Rico.
>
> "ARTICLE IV. Spain will immediately evacuate Cuba, Porto Rico and other islands now under Spanish sovereignty in the West Indies."

The United States thus obtained possession of Porto Rico by virtue of the protocol, and obtained title to the island by virtue of the cession by the Treaty of Paris.

In the second place this court has held that the sovereignty of the United States commenced, and therefore that of Spain ceased, at the exchange of ratifications of the Treaty of Paris. (See Dooley *vs.* the United States, 182 U. S., 222, at 230. See also the cases of De Pass *vs.* Bidwell, 124 Fed. Rep., 615, at 619; Howell *vs.* Bidwell, 124 Fed. Rep., 688, at 689; Armstrong *vs.* Bidwell, 124 Fed. Rep., 690, at 692 and 693.

In Ponce *vs.* Roman Catholic Church, 210 U. S., 296, at 309, this court said:

> "Since April 11, 1899, Porto Rico has been *de facto* and *de jure* American territory."

Subsequent to the protocol, and prior to the exchange of ratifications of the Treaty of Paris, the United States held Porto Rico by military occupation, which could not affect the sovereignty of Spain and did not destroy the property in the office of the appellant.

Wheaton on International Law, 4th edition, section 545, says:

> "During the continuance of the war the conqueror in possession *has only a usufructuary right*, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title forever."

Wheaton cites Vattel, Book III, chapter 13, sections 197, 198, in support of this statement.

Davis on Elements of International Law, at page 333, states:

> "In accordance with the present view of occupation, therefore, no permanent change ensues in the national character, or allegiance, of the population of an occupied territory as a result of the mere fact of occupation."

The mere fact of military occupation did not give the military forces sovereign rights. The rights of military occupation are distinctly limited.

As said in Hall on International Law, 2d edition, at page 430:

> "SEC. 155. If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war; in other words he has the right of exercising such control, and such control only, within the occupied territory as is required for his safety and the success of his operations."

Lieber's Code, "Instructions for the Government of Armies of the United States in the Field," provides as follows:

> "SEC. 38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity for the support or other benefit of the army or of the United States."

Nor does the mere fact of military occupation act to abrogate or destroy public offices or the title thereto. This court has held, in Ketchum *vs.* Buckley, 99 U. S., 188, that that is not the case.

Subsequent to the protocol and up to the exchange of ratifications we find, as is conceded by the demurrer, that the

appellant continued in the exercise of his rights and privileges until deprived of them by the order of the military governor of August 31, 1899. This was not on suffrance, as there was no conceivable military necessity which could call for the abolition of this ministerial office. It remained like any chattel, the absolute property of the owners till confiscated. Down to April 11, 1899, therefore, the title of the appellant to his office was unimpaired.

3. The Treaty of Paris confirmed the appellant's property rights. The protocol vested in the United States at most a usufructuary title in Porto Rico, subject to confirmation upon the terms and in the manner to be later fixed by the treaty of peace. As already indicated, the cession did not take effect until the ratification of the treaty, and the treaty is explicit as to the effect of the cession of Porto Rico upon the rights of private individuals. What was intended by the treaty is not a question of abstract intention of the parties, but of the concrete language of the document.

The clause in the treaty relating to property and rights of individuals in the territories renounced or ceded (Cuba, Porto Rico, and the Philippines) is as follows:

> "And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded or of private individuals, of whatsoever nationality such individuals may be" (Rec., p. 6, fol. 10).

It is difficult to conceive how the intention of the parties to the treaty to protect the property or rights of every description belonging to individuals in the ceded territories could have been more clearly expressed than by this sweeping provision of the treaty. There is no doubt but that the

treaty contemplated the preservation of rights as rights are understood under the Spanish law, as well as under the American law. This was held in the case of O'Reilly de Camara *vs.* Brooke, 135 Fed. Rep., 384, at page 391. There are other opinions to the same effect. See that of Attorney General Griggs in 22 Op. Atty. Genl., 617; U. S. *vs.* Reynez, 9 Howard, at 151; Strother *vs.* Lucas, 12 Peters, 410-466; see also Ponce *vs.* Roman Catholic Church, 210 U. S., 309.

If, therefore, the treaty referred to property as understood by the Spanish law, it is impossible that the property in the office in question was destroyed by the treaty without violating its express terms. Article 8 reads:

> "And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, *cannot in any respect impair* the property or rights, etc."

If by the operation of the treaty the property in the office be abolished, then it follows that by the cession the property was impaired, which the treaty expressly says cannot occur. The language of the treaty is specific to the effect that its operation cannot impair any property right, which includes the property right in the office in question. If, therefore, it could not be impaired it must have remained unimpaired, or in every respect a property right.

4. The claimant's petition sets forth a valid claim founded upon the Constitution of the United States. While the United States may take real or personal property whenever its necessities or the exigencies of the occasion demand, the Constitution, in the fifth amendment, guarantees that when this governmental right is asserted it shall be attended by compensation.

United States *vs.* Lynah, 188 U. S., 445, at page 465.

The provisions of the Constitution relating to life, liberty, and property are applicable to Porto Rico.

Downes *vs.* Bidwell, 182 U. S., 244.

It is immaterial whether the property so taken is of a tangible or intangible nature.

Monongahela Navigation Co. *vs.* United States, 148 U. S., 312, at page 329.

O'Reilly de Camara *vs.* Brooke, 135 Fed. Rep., 384.

We therefore have in the present case one where the office and the property right therein remained unimpaired down to the treaty, and where the property right therein was protected by the terms of Article VIII of the treaty. That being the case, the military order of August 31, 1899, clearly destroyed a valuable property right for which the appellant is entitled to compensation.

III.

The judgment of the Court of Claims should be reversed and the case remanded for proof of damages.

Respectfully submitted.

S. MALLET-PREVOST,
Attorney for Appellant, 30 *Broad Street, New York.*

No. 68.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

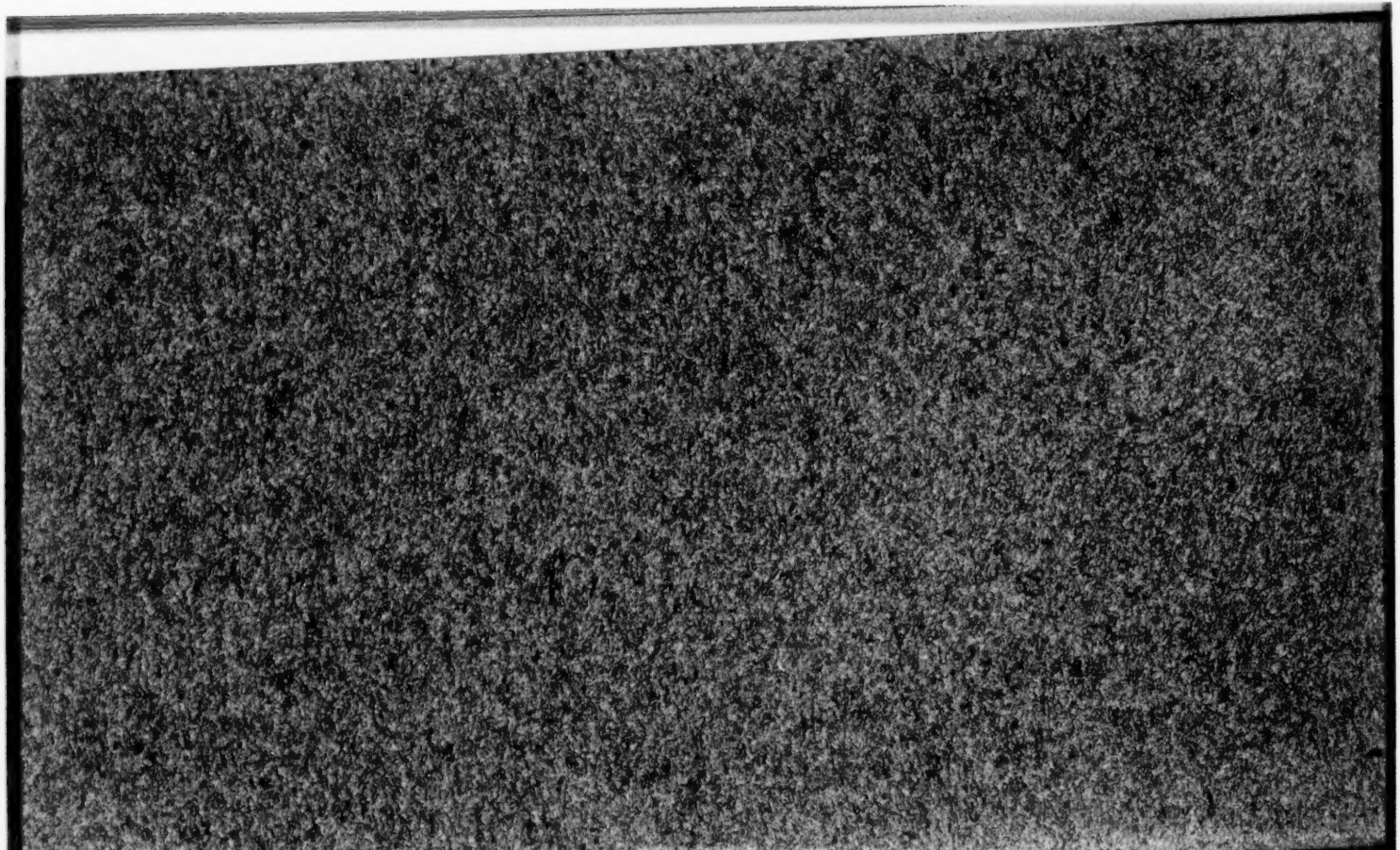
GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

GUILLERMO ALVAREZ Y SANCHEZ, APPELLANT, *v.* THE UNITED STATES. } No. 69.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The questions here presented are in a degree novel and important. Several cases of like character to this are pending in the Court of Claims awaiting the decision herein.

Appellant, an inhabitant of the island of Porto Rico, seeks to recover the value of a salable office purchased from the Crown of Spain. The Spanish law by which the people of the island of Porto Rico were governed prior to the occupancy of the island by the United States forces provided for the purchase and sale of offices. Among the offices so sold and purchased was that of solicitor or procurador, which consisted

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of two kinds, solicitor for life and solicitor in perpetuity.

The office of solicitor in perpetuity was transferable from one holder to another on the purchase and sale thereof being ratified by the Crown of Spain.

On the 8th of April, 1878, appellant purchased from one Florencio Berrios y Lopez the office known as "Numbered procurador of the courts of first instance of the capital of Porto Rico," in perpetuity, and the purchase and sale of said office was thereafter ratified in accordance with the practice and custom of the Kingdom of Spain and the island of Porto Rico governing the sales and transfers of the office of procurador. Appellant exercised all the rights and privileges appurtenant to the office of procurador from the time the provisional patent was issued to him until about the 31st day of August, 1899.

Under the procedure in Porto Rico prior to the occupancy of the island by the United States forces, when litigants did not personally appear, they were necessitated to employ a solicitor or procurador. This officer was not an attorney, nor did he perform the functions of an attorney, but held from his client what may be termed a "power of attorney," which constituted him practically "an attorney in fact," as the term is recognized in the United States. The duties performed by the procurador, among others, were to transmit to the lawyer selected by the client or by the procurador all the documents,

information, and instructions in his possession relative to the matters involved in controversy; secure from a lawyer whose engagement might cease copies of such proceedings, documents, and other data in the hands of the attorney in order to deliver the same to the attorney's successor; keep his client and the lawyer engaged by his client informed as to the condition of the litigation intrusted to his care, and to send to the lawyer so engaged copies of all proceedings of which he might be notified. Furthermore, the procurador was required to pay all expenses incurred at his instance, as well as attorney's fees, even when the attorney or counsel had been selected by the client. His further duties consisted in signing extensions or stipulations, citations, requisitions, and notifications of all kinds which during the pendency of the suit should be communicated to his client, and the service of all such papers and notifications were made directly upon the solicitor.

The United States forces took possession of the island of Porto Rico in October, 1898, and maintained a military government therein until April, 1900. The treaty of peace between the United States and the Kingdom of Spain, commonly known as the "Treaty of Paris," was signed at Paris December 10, 1898.

Said treaty was ratified by the Senate and by the President of the United States on the 6th of February, 1899, and by Her Majesty the Queen Regent of Spain on the 19th day of March, 1899, and ratifications thereof were exchanged in the city of Washington,

in the District of Columbia, on the 11th of April, 1899, and on the same day the treaty was proclaimed by the President of the United States. (30 Stat. L., 1754.)

During said military occupancy by the United States, on command of Brig. Gen. George B. Davis, military governor, there was issued General Orders, No. 134, which embodied rules and regulations governing the practice of law in Porto Rico and provided, *inter alia*, that parties litigant when not appearing personally should be represented before the supreme court and the district courts exclusively by lawyers, and by Section XI referred to the office of solicitor or procurador in the following terms:

> XI. The office of solicitor (procurador) is *abolished*. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of municipal courts. (Rec., pp. 6, 10.)

Article II of the treaty provided for the cession of Porto Rico, while paragraph 1, Article VIII, cedes in Porto Rico "all the buildings, wharves, barracks, forts, structures, public highways, and other immovable property which in conformity with law belong to the public domain and as such belong to the Crown of Spain."

Paragraph 2 of said article provides as follows:

> And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any

> respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

On the 12th of April, 1900, Congress passed an act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." Section 8 of said act provides in part as follows:

> SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. (31 Stat. L., 77, 79.)

As to personal property the Spanish Civil Code in force in Porto Rico at the time of the invasion of said island by the American forces provided as follows:

> ART. 335. Personal property is considered anything susceptible of appropriation and not included in the foregoing chapter, and, in

general, all that which can be carried from one place to another without damage to the real estate to which it may be attached.

ART. 336. Incomes or pensions, either for life or hereditary, in favor of a person or family, provided they do not encumber real estate with a property lien, as well as alienated offices, contracts for public services, and mortgage loan bonds or certificates, are also personal property.

ART. 337. Personal property is either consumable (*fungibles*) or nonconsumable (*no fungibles*).

To the first class belongs that which can not be made use of, by reason of its nature, without consuming it; all other personal property belongs to the second class. (Spanish Civil Code, p. 54.)

The appellant filed his petition in the Court of Claims in which the material averments set forth the facts in the foregoing statement, and alleged, further, that by reason of said General Orders 134 and the act of Congress of April 12, 1900 (*supra*), the property or office of procurador held by appellant was finally and effectually confiscated by the Government of the United States. That the reasonable value of the office of "'transferable' or 'Numbered procurador of the courts of first instance of the capital of Porto Rico,' in perpetuity, of which claimant was deprived as aforesaid, is fifty thousand ($50,000) dollars," for which amount petitioner prayed judgment.

The Government interposed a demurrer on the ground that "the petition does not allege facts suffi-

cient to constitute a cause of action." The demurrer was sustained, opinion by Mr. Justice Peelle. (Rec., pp. 9–14, inclusive.)

ARGUMENT.

In October, 1898, the United States established a firm military occupation of Porto Rico, and this occupation absolutely displaced the sovereignty of the Kingdom of Spain over said island, its inhabitants, their property and property rights, and all property of every kind and character connected with, appurtenant to, or existing in said island. By this firm military occupancy the United States acquired the right to establish such government and to provide rules and regulations for the administration of the same as it should deem best. And, for the purposes of this case, that right was just as inherent and absolute as it was when the treaty of peace was signed in December, 1898, or when it was ratified in February, 1899, or when the ratifications were exchanged in April, 1899.

The sovereignty of the United States thus established by said military occupancy was complete in itself and required no further act, treaty, stipulation, convention, or other formal writing to confirm its supremacy. Whatever followed this military occupancy was simply an evidence of the acquiescence in and the recognition of the sovereignty of the United States over the island of Porto Rico and its people by the Government of Spain. (*Halleck's International Law*, vol. 2, p. 444; *Dooley* v. *U. S.*, 182 U. S. R., 230, 231, and authorities there cited.)

Furthermore, when said military occupancy was established, in October, 1898, the status of this appellant with relation to the office of solicitor or procurador became that of one *functus officio*, and with the passing of the duties the office itself passed out of existence, and life was never breathed into it after the military occupation became firmly established over the island. The treaty of peace, or its ratification or promulgation, in no respect changed the dead office into one of activity or clothed the holder thereof with right or power to act. Neither did General Orders, No. 134, issued by the command of Brigadier-General Davis, revive any rights of action which the appellant may have had by reason of said military occupancy *per se* abolishing said office of procurador. If after the military occupancy appellant exercised certain privileges which the office authorized him to exercise before said occupancy, such later acts were simply by the grace and permission of the military power and not by reason of any right or prerogative.

The petition alleges that "said laws continued to be the laws of Spain in force in Porto Rico and were in full force and effect on August 31, 1899, when said office of procurador or solicitor, belonging to this claimant, was abolished as hereinafter set forth." (Rec., p. 2.)

The petition sets forth part of section 8 of the act of April 12, 1900, cited in the statement and alleges "that by the aforesaid act of Congress said property of the plaintiff was finally and effectually confiscated

by the Government of the United States." (Rec., p. 7.)

While adhering to our proposition that the office was abolished by operation of law at the time of said military occupancy of Porto Rico, yet for the purposes of this argument we deem it but little difference whether said office was abolished by reason of the United States forces occupying the island of Porto Rico and establishing a military government, or by the treaty, General Orders, No. 134, the act of April 12, 1900, or all of these acting in conjunction to the effect of completely annihilating the office of procurador.

Speaking for the court below, Mr. Justice Peelle said:

> When the United States thus took and maintained possession of said island, the sovereignty of Spain was thereby appropriated by them, and the inhabitants of said island became subject to the will of the United States, though their private rights and their relations to each other remained the same. (*The Fama*, 5 C. Rob., 126; *United States* v. *Percheman*, 7 Peters, 86; *United States* v. *Hayward*, 5 Gallison, 52.)
>
> And as the military occupation of said island was firm, the United States, by virtue thereof, acquired all the rights of the displaced sovereignty, including the right to acquire complete title at least to all movable property of a public character belonging to Spain, and as well the public offices therein having to do with the administration and execution of the laws in said island. (*United*

States v. *Rice*, 4 Wheat., 246–254; *Fleming* v *Page*, 9 How., 603–615.)

When the treaty of Paris of December 10, 1898 (30 Stat. L., 1754), was negotiated, the principle of *uti possidetis* was recognized, i. e., the right to retain possession of the territory acquired by force during the war, and as there is no stipulation in the treaty to the contrary, the island was left in the state in which it was found. Hence the title of the conqueror in the public movable property as well as to the public offices created by the sovereignty of Spain could not thereafter be questioned. (*Wheaton's International Law*, sec. 545.)

However, whether the island be considered as acquired by conquest or by cession on the basis of possession of the territory by force, the inhabitants in either case became subject to the sovereignty of the United States, the difference in substance being that in case of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sovereignty is appropriated, while if acquired by expressed cession the sovereignty is transferred by the act of the state making the cession. (*Hall's International Law*, sec. 206.) The former, however, was the course which Spain was forced to pursue; that is, by virtue of the military possession of the island, Spain was forced, as a condition of peace, to cede to the United States the island so acquired and held, not that the cession was necessary to give to the United States the sovereign control of the island, but it operated to confirm in them all the rights which they had theretofore acquired by conquest.

(Rec., pp. 11, 12.)

Solicitors or procuradors did not have a vested right in the office.

We contend that the office in question was not property, as that term is used in paragraph 2 of article 8 of the treaty. Appellant did not hold the office absolutely and unconditionally. His right was not a vested right. He could hold no better title than his vendor, who possessed at most no more than a revocable license to exercise the office of procurador or solicitor. His right to practice was no more vested than the right of a lawyer in this country to practice before the bar of this court. Appellant could be dispossessed of the office by the sovereignty which created it. He held the office at the will and during the pleasure of the sovereignty of Spain, and its tenure was subject thereto; therefore, if it be considered as property it must be conceded that the title to such property is held by the office-holder conditionally and not absolutely. It was the practice of the Spanish Crown to assert and maintain its control and, to an extent, right of ownership from time to time over its salable offices. The beneficial interest received by the purchaser was at all times subject to limitations and restrictions thrown about it by the sovereignty.

In the royal cédula of October 15, 1787, it is stated:

> Taking into consideration that, although the incumbents of offices which can be sold and renounced have the indirect ownership, with the limitations prescribed by law, they are not authorized to dispose of the same at will as any estate of their patrimony, because my Crown

> always preserves the direct ownership (dominio directo), with a possible right of reversion thereto for different causes which may arise. * * * I have decided to forbid, as a general rule, any imposition of annuities or other charges on salable and renounceable offices of my Kingdoms of the Indies. * * * And finally, I declare that there can not be attached more than one-third of the emoluments and fees of said offices for the debts of their incumbents.

Again, the Crown of Spain reserved to itself the right to repossess purchased offices, notwithstanding the clause in the certificate of appointment guaranteeing immunity from such exercise of authority.

The royal order of November 13, 1817, declares:

> ARTICLE 1. All the offices *belonging to the Crown* which have been disposed of are revertible to the Crown, and may be repurchased, although they have been sold with the proviso that they were to be perpetual and that they might not be repurchased, and notwithstanding any provision that may seem to prohibit it.
>
> (See Magoon's Reports on the Law of Civil Government, etc., submitted to Hon. Elihu Root, Secretary of War, pp. 201, 205.)

At all times when a transfer of a salable or purchasable office was made between individuals, either by purchase or inheritance, it was necessary to secure the assent of the Crown to such transfer. These powers retained by the sovereignty of Spain are incompatible with the idea of an absolute property right in the incumbent of a purchasable office.

It is shown by the record in this case that the appellant bought the office in question from one Florencio Berrios y Lopez on the 8th day of April, 1878, but that the provisional patent to the office was not issued in favor of appellant until the 18th of March, 1880, at which time the tenure of said office was

> approved and confirmed and a final patent issued therefor by His Majesty Alfonso XII, King of Spain, through the minister of the colonies of said Kingdom of Spain, in accordance with the laws, practice, and custom of the said Kingdom of Spain and the said island of Porto Rico governing the sales, surrenders, and transfers of said office of procurador of the capital of Porto Rico. (Rec., p. 1.)

It is immaterial whether the office was abolished by said military occupancy of Porto Rico, or extinguished by the Paris Treaty, or annihilated by the order of General Davis, or destroyed by the act of Congress of April 12, 1900. In any event, or by operation of all these circumstances combined, the appellant is without right of recovery.

The property character of this office, if it is to be so considered, was property of the Kingdom of Spain as well as of appellant, and it is conceded by all reputable authorities that the invading army has the right to confiscate the property of all public enemies. As bearing upon this we cite *Hall's International Law* (5th edition, pp. 471, 472, 474, 481, 500, 501, 504, 533, 535); *War Power under*

the Constitution, by Whiting (2d ed., pp. 340, 342, 347, 348); *Halleck's International Law* (vol. 2, pp. 75–77); *Taylor's International Law* (p. 539), *United States* v. *Pacific R. R. Co.* (120 U. S. R., 228).

It has been held by the courts of this country that—

> Public offices are trusts held solely for the public good. They are conferred from considerations of the ability, integrity, and fitness of the appointee. Whatever introduces other elements to control the appointing power must necessarily lower the character of the appointments to the detriment of the public. Agreements for compensation to procure these appointments tend to introduce such elements, and are therefore viewed as inconsistent with sound morals and public policy. (*Tool. Co.* v. *Norris*, 2 Wall., 55.)

Again, it has been held that—

> *The incumbent of an office has not, under our system of government, any property in it.* His right to exercise it is not based upon any contract or grant. It is conferred as a trust to be exercised for the benefit of the public. Such salary as may be attached to it is designed to enable the incumbent the better to perform his duties by the more exclusive devotion of his time thereto. A public office and its creation is a matter of a public, not a private, law. The decision of some States proceeds upon the ground that an incumbent has a property in his office, and that he can not be deprived of his right without the judgment of a court—a view supported by the doctrines of

> the common law, which regarded an office as a hereditament, but which has no foundation in a representative government. (*State ex rel. Attorney-General* v. *Hawkins*, 44 Ohio St., 109–113.)
>
> An office is not property, but a privilege or a prerogative, which can be taken away without compensation whenever the public welfare requires. (*Burrows* v. *Peyton*, 16 Grat., 470.)

In the case of *Taylor and Marshall* v. *Beckham* (178 U. S., 547) Mr. Chief Justice Fuller, in delivering the opinion of the court, used the following language:

> The decisions are numerous to the effect that public offices are mere agencies or trusts and not property as such. Nor are the salary and emoluments property, secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either property or a contract right (citing numerous cases). (*Supra*, p. 577.)

Mr. Justice Brewer, with whom Mr. Justice Brown concurred, delivered a dissenting opinion, but did not take issue with that portion of the majority opinion

which is applicable in this case. The learned justice in his dissenting opinion says:

> An office to which a salary is attached, in a case in which the controversy is only as to which of two parties is entitled thereto, has been adjudged by this court, and rightfully, to be property within the scope of that clause of the fourteenth amendment which forbids a State to "deprive any person of life, liberty, or property without due process of law."
>
> * * * * *
>
> I am clear, as a matter of principle, that an office to which a salary is attached is, as between two contestants for such office, to be considered a matter of property.
>
> I agree fully with those decisions which are referred to, and which hold that as between the state and the officeholder there is no contract right either to the term of office or the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary.
>
> (*Supra*, pp. 581, 583.)

The office in question was a mere function or public station created by the Crown of Spain. It was not, nor can it be regarded as, property of a tangible nature. While spoken of as salable, it was not private property, nor property of any nature, but a public office under the Crown of Spain, as much so as that of the highest office of the Spanish régime in Porto Rico.

We contend, therefore, that appellant can not recover under the second paragraph of article 8 of

the treaty for the reason that he had no property right in the office in question, and, further, that the office itself and the emoluments thereof were not such property as is contemplated in said second paragraph.

A positive and affirmative act on the part of the United States was necessary to secure appellant in the exercise of the privileges of the office of procurador.

It is alleged in the petition that appellant "exercised and continued to exercise all of the rights and privileges appurtenant to said office of procurador or solicitor from the time that the said provisional patent was issued to him until he was deprived of said office on or about the thirty-first day of August, in the year one thousand eight hundred and ninety-nine, as hereinafter set forth." (Rec., p. 1.)

It was held by the court below:

> After the conquest of the island and the confirmation thereof by the treaty as aforesaid, the claimant, if he continued to hold said office, did so at the sufferance and will of the United States, and no right of property in said office can be predicated on such continuance in office.
>
> The office so held by the claimant, as well as all other offices having to do with the execution and administration of the laws in force in said island, were subject to the will and control of the United States exercised through the President, as Commander in Chief of the Army and Navy of the United States, or the Congress.
>
> (Rec., p. 12.)

Lieber's Instructions for the Government of Armies of the United States in the Field, section 1, paragraph 6, lays down the rule as follows:

> All civil and penal *law* shall continue to take its usual course in the enemies' places and territories under martial law (military government), unless interrupted or stopped by order of the occupying military power; *but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law* (military government), *or continue only with the sanction or, if deemed necessary, the participation of the occupier or invader.*

Judge Magoon, in construing the foregoing instruction, says:

> I understand this instruction to mean that it requires an affirmative act of the invader to abrogate the civil or penal *laws*, but the authority of legislation, execution, and administration of all laws passes to the military occupant as a result of the occupation and without further affirmative act or declaration. Should he thereafter desire to confer the right to exercise any or all of said powers upon the persons previously exercising them or other persons, *an affirmative act is necessary.*
>
> If this is the correct view, it follows that upon the military occupation of Habana by the forces of the United States being established, the authority theretofore possessed by these claimants by virtue of said office passed,

ipso facto, to the military occupier and will remain there so long as the occupation continues, to be exercised or not, as the occupier shall determine.

I take this to be the rule even when it is conceded that the office does not become *functus officio* as a result of military occupation.

I see no reason why an exception should be made to this general rule in the instance under consideration. The fact that the term of office was perpetual does not give exemption, for the principle is the same as is involved where the term is for life, a series of years, during good behavior, or at the royal pleasure. If the former incumbent of this office may rightfully demand restitution and indemnity, why may not any other Spanish officer demand similar treatment at the hands of the military government?

(Magoon's report, supra, pp. 198, 199.)

It will be seen by an examination of the petition that there is no allegation of an affirmative act on the part of the Government maintaining this appellant in office or invoking the office in the aid of the government of the island. In order to give appellant any right to perform the duties of a procurador, or to in any way recognize his acts as such officer, it was absolutely necessary that the military power in control of the island of Porto Rico affirmatively designate appellant to perform such services and thereby recognize the same as an aid to the administration of the laws under which for the time being the people were governed.

The act of General Davis in abolishing the office can not possibly be construed, under the circumstances of this case, as having at any time authorized or recognized the appellant in the performance of his so-called official duties. The mere passive attitude of the military governor during the time appellant was exercising the functions of his office, as alleged in the petition, falls far short of acknowledging that he had any *right* to perform the duties of said office.

The office in question not in harmony with the spirit of our institutions.

There is little force in the argument to the effect that the invading country is bound to respect and to continue in operation and existence an institution that is absolutely at variance with and antagonistic to the laws, government, and institutions of the country sending out the invading army.

The effects of a transfer of territory from one government to another upon the local laws and the rights of the inhabitants are dependent upon, first, the general principles of international law; second, the specific provisions of the treaty of cession, in case the territory is acquired by cession; and, third, the provisions of the constitution of the country acquiring the new domain. It may be conceded that the change of sovereignty does not affect those portions of the local law that regulate the personal and property relations of the inhabitants *inter se*, yet all laws of a political or administrative character which are not in harmony with the institutions of the new sovereignty are abrogated and annulled.

They lose their force by the fact of transfer without specific action on the part of the new government. It can not be assumed that the new sovereign power will permit the continued existence of institutions which are hopelessly at variance with the genius and character of its political system. In order to continue local customs and laws not in harmony with the political institutions of the new sovereign it is necessary that affirmative action be taken showing an evident intent and purpose to preserve such political institutions of the displaced sovereignty that are not in harmony with the new government.

The Supreme Court of Porto Rico has decided that the "Spanish press law" of November 11, 1886, in force in Porto Rico was abrogated by the change of sovereignty. The court held to the effect that the first amendment to the Constitution prohibiting Congress from making any law abridging the freedom of the press was in force in Porto Rico. (Decisiones de Puerto Rico, vol. 1, p. 275.)

The treaty of peace does not provide that the United States shall respect the property or rights recognized by the civil code of Spain, but only the "property or rights which *by law* belong to the peaceful possession of property of all kinds." It was the intention of the parties to the treaty that this Government would respect only those property rights which were not repugnant to the Constitution and laws of the United States.

Upon the acquisition of New Mexico in 1846 General Kearney, then military governor, instituted certain reforms in the judicial system of the conquered territory. The question arose as to the legality of the courts thus created under the ordinances of the military government. The case came to this court upon writ of error from the Supreme Court of the Territory of New Mexico. Mr. Justice Daniel, speaking for the court, said:

> Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and reestablished. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror nor restored to its original condition or allegience, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled pur-

pose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the territorial government in the exercise of powers delegated by Congress. That no power whatever, incompatible with the Constitution or laws of the United States or with the authority of the provisional government, was retained by the Mexican Government, or was revived under that Government from the period at which the possession passed to the authorities of the United States.

* * * * *

By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the Government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, *except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain.* Amongst the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable, in order to secure those objects

> for which such a government is usually established. (*Leitendorfer et al.* v. *Webb*, 20 How., 176.)

Under appellant's theory, if the laws of Spain had recognized a right of property in slaves, or if the Crown of Spain had granted a perpetual right to distill spirituous liquors without the payment of internal-revenue taxes, or had sold the right to collect customs dues on a percentage basis, the United States would now be compelled to respect such rights of property.

The order of General Davis was not a recognition of a right to the office, but, on the other hand, was no more than declaratory of what had taken place immediately upon the dispossession of Spanish sovereignty by the military occupation of the island; that is to say, the office was extinguished when Spain's sovereignty ceased, because, being political and appurtenant to the Crown, the office could exist only by virtue of such sovereignty.

In the case of *State* v. *Dews* (R. M. Charl. (Ga.), 397, 400) it was held:

> That a public office is the property of him to whom the execution of the duties is intrusted is repugnant to the institutions of our country, and is at issue with that universal understanding of the community which is the result of those institutions. Public officers are, in this country, but the agents of the body politic, constituted to discharge services for the benefit of the people under laws which the people have prescribed. So far from holding a proprietary interest in their offices,

> they are but naked agents without an interest. As public agents they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*—which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty.

Acquired territory is held by the new sovereignty subject to its institutions and not to the laws of the former sovereignty (*Vattel's Law of Nations*, B. 1, ch. 19, secs. 210, 244, 245; and B. 2, ch. 7, sec. 80; *Pollard's Lessee* v. *Hagan*, 3 How., 225.)

International law does not require a nation to protect property the existence of which is inconsistent with its system of government. That the United States should be called upon to protect slave property, titles of nobility, monopolies, or purchasable offices would be clearly inimical to the spirit of our laws and the genius of our institutions.

It is a well-established principle of international law that where the enforcement of the foreign law would contravene some important and established policy of the state of the forum, or where such enforcement would contravene the canons of morality established by civilized society, the enforcement of such foreign laws is forbidden. (See *Minor's Conflict of Laws*, ch. 2, sec. 5, p. 9.)

The State of Kansas ceded to the General Government exclusive jurisdiction over a military reservation within that State, then and previously owned

by the United States. At the time of the cession there was a statute in Kansas to the effect that railroad companies whose roads were not inclosed by a lawful fence should pay to the owners the full value of animals killed by the engines or cars of the railroad companies, regardless of whether the killing was caused by negligence.

In an action for the value of an animal killed by the Rock Island Railway Company the District Court gave judgment in favor of the plaintiff, which judgment was subsequently affirmed by the Supreme Court of the State. The case came to this honorable court on writ of error and one of the questions presented was: Did the Kansas statute relating to the killing or wounding of stock by railroads continue in force within the limits of the reservation after the act of cession? In discussing the principle involved in this question Mr. Justice Field, speaking for the court, seems to have clearly and positively announced the law applicable to the case at bar:

> As a matter of course all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to

that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. (*Chicago, Rock Island & Pacific Ry. Co.* v. *McGlinn*, 114 U. S., 546.)

Maria Francisca O'Reilly de Camara v. Brooke (209 U. S., 45).

The plaintiff in the foregoing case was a Spanish subject and alleged title by descent to the right to carry on the slaughtering of cattle in the city of Habana, Cuba, and to receive compensation therefor. It was claimed that the right was incident to an inheritable and alienable office, namely, that of alguacil mayor or high sheriff of Habana. The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid, and in 1895 one half of the emoluments was sold on execution by consent, the other half remaining to the plaintiff or those whom she represented.

On May 20, 1899, the island of Cuba being under the military jurisdiction of the United States, Brigadier-General Ludlow, then governor of Habana, issued an order that the grant in connection with the service of the city slaughterhouse of which the O'Reilly family and its grantees were the beneficiaries was ended and declared void and that thenceforth the city should make provision for such services. The plaintiff appealed from this order to the military governor of Cuba, who held that in view of the cessation of Spanish sovereignty the office in question, together with all rights pertaining thereto or derived therefrom, was abolished.

The case was before this court on writ of error to review the judgment of the district court dismissing the complaint. The opinion, delivered by Mr. Justice Holmes, announces the governing principle in this case.

> But we do not dwell longer upon the ratification of what was done during the military occupation of Cuba, or consider the question whether the ratification was needed, because we agree with the opinion of the Secretary of War that the plaintiff had no property that survived the extinction of the sovereignty of Spain. The emoluments to which she claims a right were merely the incident of an office, and were left in her hands only until the proceedings for condemnation of the office should be completed and she should be paid. The right to the office was the foundation of the right to the emoluments. Whether the office was or was not extinguished in the sense that it could no longer be exercised, the right remained so far that it was to be paid for, and if it had been paid for the right to the emoluments would have ceased. If the right to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end. No ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source. But of course the right to the office or to be paid for it did not exist as against the United States Government, and unless it did the plaintiff's case is at an end (pp. 52, 53).

Prohibitions of the Constitution.

The petition alleges, after reciting the appointment:

> That claimant thereupon became vested with all the rights and privileges appurtenant to said office under said laws.
>
> That said claimant exercised and continued to exercise all of the rights and privileges appurtenant to said office of procurador or solicitor from the time that the said provisional patent was issued to him until he was deprived of said office on or about the 31st day of August, in the year 1899, as hereinafter set forth.

This is an allegation to the effect that appellant was holding and exercising an office in territory under the control and sovereignty of the United States and whose inhabitants were subjects of the government established in Porto Rico by the United States. The status of appellant must necessarily have been that of a "person holding an office of profit or trust" under the United States.

Article I, section 9, clause 8, of the Constitution provides as follows:

> No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Here we find the novel situation in which this appellant was placed, namely, holding an office of profit and trust under the United States and at the same time the recipient of an office from the King of Spain, the very office by which he was exercising his official duties having been conferred upon him by a foreign prince.

If appellant was holding an office under the United States from the time of the military occupancy until October 31, 1899, and was exercising the duties of the office as alleged in the petition, he necessarily was receiving from day to day the emoluments, fees, compensations, and benefits of an "office" conferred by the Kingdom of Spain without the consent of the Congress, and this benefit which had its inception and foundation in the "office" conferred by a foreign state was continuous throughout the time appellant was holding an office under the United States. If appellant had relinquished the office conferred upon him by the Kingdom of Spain when he entered upon his duties as holder of an office under our Government, he could have no claim. On the other hand, if he retained the office so granted to him by the Crown of Spain, he was prohibited under the Constitution from receiving any fees, emoluments, or benefits of the office accruing while he was holding an office under the Federal Government. In either event, no right could possibly exist by which appellant is entitled to recover for either the loss of the office or the loss of the emoluments thereof.

It may be that where an office is conferred upon a citizen of the United States by a foreign state, and such citizen is subsequently appointed or elected to an office of profit and trust under the United States, such election or appointment does not affect the office conferred by a foreign prince, unless there is a continuous benefit derived from the same by the recipient thereof during his tenure of office under the United States. Where, however, there is such continuous benefit running to and received by such officer, then we contend that the mischief sought to be prevented by the Constitution arises, and, therefore, one of the offices must fall.

The Court of Claims has no jurisdiction of a claim "growing out of or dependent on any treaty stipulation entered into with foreign nations" (R. S., sec. 1066).

There is no such condition in the case at bar as would bring the claim within the rule announced in the case of *United States* v. *Weld* (127 U. S., 51), where jurisdiction was held to depend on the statute and not on the treaty.

Appellant seeks to recover for the loss of his office by reason of the second paragraph of Article VIII of the treaty whereby he contends that the United States agreed not to impair his property right in the office in question.

For the reasons we have heretofore given he could not possibly recover unless his alleged rights are protected by the treaty, hence his claim is by reason of the treaty and necessarily "grows out of the treaty," within the meaning of that term as used in the statute.

Mr. Root, then Secretary of War, speaking of the territory acquired under the treaty of Paris, said:

> As between the people of the ceded islands and the United States, the former are subject to the complete sovereignty of the latter, controlled by no legal limitations except those which may be found in the treaty of cession; that the people of the islands have no right * * * to have them treated as the Territories previously held by the United States have been treated, or to assert a legal right under the provisions of the Constitution which was established for the people of the United States themselves and to meet the conditions existing upon this continent, *or to assert against the United States any legal right whatever not found in the treaty.*
>
> (The above words not italicized in the original.) .
>
> (See Annual Report of the Secretary of War for 1899, Vol. I, pt. 1, p. 24.)

It may be contended that section 1066, Revised Statutes, has been repealed by the act of March 3, 1887. We fail to find any decision of either the Court of Claims or of this court that will justify such contention.

CONCLUSION.

The order of General Davis was not necessary to abolish the office of procurador. By virtue of and under operation of law the office went out of existence the moment the United States secured firm control and occupancy of the island. The official

powers with which appellant was clothed under the Spanish law and the right to exercise those powers dropped from him the moment the United States obtained sovereignty. They evaporated and passed into the realm of the Deacon's "One-Hoss Shay."

There was nothing left but the man, and if litigants desired to appoint him an agent or constitute him their "attorney in fact" the right to act was guaranteed to him, and neither the United States nor any of its officers took from him the power of such agency. This office, a subject of barter and sale, of purchase and transfer; this elusive, invisible, volatile, so-called property right was not in accord with the Constitution and laws of the United States, and it suffered the fate of all property rights and laws which are not in harmony with our system of Government. The statutes in force and the common law recognized by the United States enable principals to appoint and constitute agents to act in their behalf. Therefore this purchasable office was useless; indeed, worse than useless, in that it was subversive of good morals.

Appellant purchased the office with due notice that the tenure thereof was subject to the continuance of the sovereignty which created the office. When the government of which the office forms a part is succeeded by a different and independent form of government, the new sovereignty neither inherits nor assumes any obligation to retain the

offices of the old sovereignty or to make compensation for their loss. If the Spanish Government was unable to preserve to appellant the office in question and the emoluments thereof and maintain him in office as it contracted to do, then his right of action is against the Spanish Government and not against the United States.

The United States did not agree in the treaty to recognize or perpetuate any part of the Government of Spain in the island of Porto Rico. On the contrary, Spain relinquished all control of every kind over the island. Neither did the United States undertake in the treaty to protect property rights which were repulsive and antagonistic to our established system of laws, and the exercise of which were unlawful and contrary to our ideas of good government.

We do not believe that Spain in entering into the treaty contemplated for a moment that it was stipulating for the protection of this appellant in the exercise of an office granted by the Spanish Government and well known to be out of harmony with our institutions and laws. It was clearly understood by the parties to the convention that Porto Rico had ceased to be a colony of the Kingdom of Spain and that the sovereignty of that nation, with all that adhered to it, either expressly or by implication, passed to the United States.

The demurrer to the petition raises all the issues presented in this brief, and we respectfully ask that

the judgment of the court below dismissing the petition be affirmed.

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